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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ISAIAH SMITH, *Plaintiff*	§ § §	
v.	§	**Civil Action No.: 4:15-CV-818-A**
BIRDVILLE INDEPENDENT SCHOOL DISTRICT, *Defendant*	§ § § §	

DEFENDANT BIRDVILLE INDEPENDENT SCHOOL DISTRICT'S BRIEF IN SUPPORT OF ITS 12(b)(6) MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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ISAIAH SMITH, *Plaintiff*	§	
	§	
v.	§	**Civil Action No.: 4:15-CV-818-A**
	§	
BIRDVILLE INDEPENDENT SCHOOL DISTRICT, *Defendant*	§	

DEFENDANT BIRDVILLE INDEPENDENT SCHOOL DISTRICT'S BRIEF IN SUPPORT OF ITS 12(b)(6) MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Defendant, Birdville Independent School District ("District") and files this Brief in Support of its 12(b)(6) Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted, and shows the Court the following.

I. STATEMENT OF THE CASE

1. Plaintiff Isaiah Smith (hereinafter "Plaintiff") sued Birdville Independent School District, alleging that the District violated his rights under Title IX of the Education Amendments Act of 1972. Dkt. No. 18. Specifically, Plaintiff claims that Defendant violated Title IX by discriminating against him on the basis of gender, gender stereotypes and sexual orientation based on alleged harassment by other District students. Dkt. No. 18 at ¶ 6. Plaintiff seeks equitable relief, compensatory damages, and attorneys' fees. Dkt. No. 18 at ¶¶ 54-59. In his First Amended Complaint, Plaintiff alleges for the first time that he was retaliated against in violation of Title IX. Dkt. No. 18 at ¶ 48.

2. Plaintiff filed his Original Complaint on October 28, 2015. Dkt. No. 1. The District executed a waiver of service sent on November 5, 2015. Dkt. No. 8. On January 4, 2016, the District filed its 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and Brief in Support. Dkt. Nos. 11, 12. On January 26, 2016, Plaintiff filed his First Amended Complaint. Dkt. No. 18. On February 1, 2016, the Court issued an Order requiring the District to file an answer or other response to Plaintiff's First Amended Complaint by 4:00 p.m. on February 11, 2016. Dkt. No. 21. Also on February 1, 2016, the Court issued an Order denying as moot Defendant's Motion to Dismiss for Failure to State a Claim. Dkt. No. 22. Defendant timely files this Motion to Dismiss as Plaintiff's Amended Complaint is legally insufficient under Federal Rule of Civil Procedure 12(b)(6).

II. FACTUAL BACKGROUND[1]

3. Plaintiff Isaiah Smith attended Defendant Birdville Independent School District's High School until he graduated on or about May of 2014. Dkt. No. 18 at ¶¶ 11-12. Plaintiff alleges that during his years as a student at Birdville High School, he was subjected to bullying from other District students due to his sexual orientation. Dkt. No. 18 at ¶¶ 13-42. In his Amended Complaint, he alleges for the first time that he was subjected to retaliation for "advocating on his own behalf." Dkt. No. 18 at ¶ 48.

III. 12(b)6 MOTION TO DISMISS STANDARD

4. Dismissal is appropriate under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). Rule 12(b)(6) must be read in concert with the pleading standard set forth in Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2); *see Ashcroft v. Iqbal,* 556

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[1] The factual allegations set forth herein are taken from Plaintiff's First Amended Complaint and are asserted solely for the purposes of this Motion to Dismiss. Accordingly, Defendant does not concede or waive its right to contest any of Plaintiff's alleged facts.

U.S. 662, 677–68 (2009). In order to survive the motion to dismiss, Plaintiffs must provide the grounds of entitlement to relief, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (internal citations omitted). Indeed, the complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court, drawing upon its 'judicial experience and common sense,' to reasonably infer that the defendant is liable for the misconduct alleged." *Aleman v. Edcouch Elsa Indep. Sch. Dist.,* 982 F. Supp. 2d 729, 732 (S.D. Tex. 2013) (citing *Iqbal,* 556 U.S. at 678; *Twombly,* 550 U.S. at 556). "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal,* 556 U.S. at 679 (quoting Fed.R.Civ.P. 8(a)(2)). "Thus, although all reasonable inferences will be resolved in favor of the plaintiff, the plaintiff must plead 'specific facts, not mere conclusory allegations.'" *Tipps v. McCraw*, 945 F. Supp. 2d 761, 765 (W.D. Tex. 2013) (citing *Tuchman v. DSC Commc'ns Corp.,* 14 F.3d 1061, 1067 (5th Cir.1994)); *see also Plotkin v. IP Axess Inc.,* 407 F.3d 690, 696 (5th Cir.2005) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.")

IV. ARGUMENT AND AUTHORITIES

A. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR VIOLATION OF TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972.

i. Portions of Plaintiff's Title IX claim are time-barred.

5. Most of the alleged incidents supporting Plaintiff's Title IX claim are subject to dismissal because they are barred by Texas's two-year statute of limitations for general personal injury

claims. *Mary King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 758-59 (5th Cir. 2015); *see also A.W. v. Humble Indep. Sch. Dist.*, 25 F. Supp. 3d 973, 987 (S.D. Tex. 2014); TEX. CIV. PRAC. & REM. CODE § 16.003. A complaint is subject to dismissal under Rule 12(b)(6) for failure to state a claim on which relief may be granted when the affirmative defense, including a statute of limitations defense, is evident from the plaintiff's pleading. *King-White,* 803 F.3d at 758; *see also A.W.* 25 F.Supp. 3d at 988 (citing *White v. Padgett,* 475 F.2d 79, 82 (5th Cir.)). Congress did not provide a statute of limitations for claims brought under Title IX; however, "[e]very appellate court to consider the issue has held that Title IX claims should be treated like § 1983 claims and governed by state statutes of limitations for personal injury claims." *A.W.* 25 F.Supp. 3d at 988 (collecting cases).

6. On October 20, 2015, the Fifth Circuit held that Texas' two-year statute of limitations for personal injury actions found in TEX. CIV. PRAC. & REM. CODE § 16.003 applies to both Title IX and § 1983. *King-White,* 803 F.3d at 758-59. Section 16.003 specifically requires persons to bring suit for personal injury "not later than two years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE § 16.003. The *King-White* plaintiff brought suit as an adult for alleged violations of Title IX and Section 1983 which occurred when she was a student. *King-White,* 803 F.3d at 758-59. Because the *King-White* plaintiff's claims accrued while she was a minor, the district court held, and the Fifth Circuit affirmed, that her Title IX and § 1983 claims were time-barred because they were filed more than two years after the plaintiff turned 18, and equitable tolling principles did not apply. *King-White,* 803 F.3d at 762-64. The portions of Plaintiff's Title IX claim which are time-barred in this case should be dismissed accordingly.

7. Plaintiff turned 18 on May 16, 2013 and filed his Original Complaint on October 28, 2015. Dkt. No. 1, ¶ 11. Accordingly, any Title IX claim which accrued prior to October 28,

2013 is time-barred. *King-White,* 803 F.3d at 763; TEX. CIV. PRAC. & REM. CODE § 16.003. Similarly, any Title IX claims which were not raised in his Original Complaint and accrued prior to January 26, 2016, when Plaintiff filed his First Amended Complaint, are time-barred. *See id.* The Fifth Circuit further held in the *King-White* case that "a claim accrues and the limitations period begins to run, 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'" *King-White,* 803 F.3d at 762. "A plaintiff's awareness encompasses both knowledge of the injury and knowledge of the causal link between the injury and the defendant." *A.W.* 25 F. Supp. 3d at 989. "The plaintiff need not know that a legal cause of action exists; she need only know facts that would support a claim." *Id. (*citing *Piotrowski,* 237 F.3d at 576). Finally, "awareness for accrual purposes does *not* mean actual knowledge", merely the "existence of circumstances that would lead a reasonable person to investigate further." *King-White,* 803 F.3d at 762 (citing *Piotrowski,* 237 F.3d at 576)(internal quotation marks and alterations omitted).

8. Plaintiff alleges that much of the alleged harassment from other students underlying his claims occurred from January of 2013 through October of 2013. Dkt. No. 18 at ¶¶ 13-20. It is clear from the face of his Amended Complaint that these allegations of harassment took place more than two years before this lawsuit was filed. *See* Dkt. No. 18 at ¶¶ 11, 13-20. According to his Amended Complaint, Plaintiff was 18 years old on May 16, 2013. Dkt. No. 18 at ¶11. Plaintiff had knowledge of his alleged injury of sexual orientation-based harassment, and knowledge of the causal link between the Birdville HS students and the Defendant District, from the moment it occurred, as evidenced by his alleged reports of the conduct to District officials. Dkt. No. 18 at ¶¶ 13-20. It is clear from the face of his Amended Complaint that much of

Plaintiff's Title IX claim is time-barred.[2] *King-White,* 803 F.3d at 762-63; *A.W.,* 25 F.Supp.3d at 989-90; *see also Doe v. Henderson I.S.D.,* 237 F.3d 631, *2 (5th Cir.2000) (per curiam) (Table) (holding that civil rights causes of action accrued prior to the plaintiffs' eighteenth birthdays, and explaining that "[t]he plaintiffs' causes of action accrued when they realized the conduct was wrong because it was at that time that the plaintiffs 'kn[ew] or ha[d] reason to know of the injury which is the basis of the[ir claims]'").

ii. Plaintiff's Title IX retaliation claim is time-barred.

9. In his Amended Complaint filed on January 26, 2016, Plaintiff alleges for the first time that he suffered illegal retaliation under Title IX "as he filed numerous complaints with the School District about the bullying and harassment he experienced and was ultimately punished for advocating on his own behalf." Dkt. No. 18 at ¶ 48. The only allegations of "punishment", or arguable adverse action, included in Plaintiff's Amended Complaint are: (1) he was taken to the assistant principal's office on October 28, 2013 for tearing pages out of his Bible in the middle of Spanish class, (2) on October 30, 2013, he was suspended for one day for carrying his torn Bible around campus, and (3) also on October 30, 2013 his suspension was extended to three days when the assistant principal demanded that Plaintiff give him the Bible and Plaintiff refused his directive. Dkt. No. 18 at ¶¶ 21-23. Plaintiff also admits that his suspension was later expunged. Dkt. No. 18 at ¶ 24. The facts alleged by Plaintiff in support of his Title IX retaliation claim occurred more than two years before Plaintiff alleged his Title IX retaliation claim, as the alleged "punishment" or retaliation occurred on October 28 and October 30, 2013,

[2] To the extent that Plaintiff purports to state a claim under section 1983, such claim is barred by the statute of limitations to the same extent as his Title IX Claim, as is apparent from the face of his Complaint. *Mary King-White v. Humble Indep. Sch. Dist.,* 803 F.3d 754 (5th Cir. 2015); *see also Piotrowski v. City of Houston,* 237 F.3d 567, 576 (5th Cir.2001) (The statute of limitations for a section 1983 claim is determined by the general statute of limitations for personal injury claims in the forum state.); *Pete v. Metcalfe,* 8 F.3d 214, 216–17 (5th Cir.1993) (The Texas two-year statute of limitations applies to a claim under section 1983).

yet Plaintiff pled no claims for Title IX retaliation until January 26, 2016. *Compare* Dkt. No. 1 at ¶¶ 34-36 *with* Dkt. No. 18 at ¶¶ 21-24, 48. It is clear from the face of his Amended Complaint that Plaintiff's Title IX retaliation claim is time-barred. *King-White,* 803 F.3d at 762-63; *A.W.*, 25 F.Supp.3d at 989-90; *see also Doe v. Henderson I.S.D.*, 237 F.3d 631, *2 (5th Cir.2000) (per curiam) (Table); *see also* 54 C.J.S. Limitations of Actions § 176 ("In order for the filing of one action to toll the statute of limitations for later filed claims, the causes of action in the original complaint ordinarily must be identical to the later asserted claims; the filing of one action does not toll the statute of limitations for all claims arising out of the same facts."); *Chestang v. Alcorn State Univ.,* 940 F. Supp. 2d 424, 432 (S.D. Miss. 2013)(holding that filing Title IX discrimination claim did not toll statute of limitations for filing Title IX retaliation claim). Such claim should be dismissed accordingly.

iii. Plaintiff's allegations of offensive name-calling, teasing, and shoving by other students failed to state an actionable claim under Title IX.

10. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Entities that receive federal funding may be liable under Title IX if they are "deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis as Next Friend of LaShonda v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999). Specifically, before a private party may bring suit under Title IX against a school district, he must establish that: (1) the school district discriminated against him because of his gender, (2) an "appropriate person" at the School District had actual notice of the discrimination, (3) the appropriate person at the District failed to

adequately respond to the discrimination, and (4) the District's response amounted to deliberate indifference. *Davis,* 526 U.S. 629, 652 (1999).

11. "Same-sex sexual harassment is actionable under title IX." *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.,* 647 F.3d 156, 165 (5th Cir. 2011). However, "[t]he offensive behavior, however, must still be based on sex, per the words of title IX, and not merely tinged with offensive sexual connotations." *Id.* (internal citations omitted). Furthermore, "[p]eer harassment is less likely to support liability than is teacher-student harassment." *Id.* at 166. The Supreme Court has made clear that in student-on-student sexual harassment cases such as Plaintiff's, in order to state a claim actionable under Title IX, he must show that the harassment was "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis,* 526 U.S. at 633. Only widespread conduct with the "systemic effect of denying the victim equal access to an educational program or activity" is actionable. *Id.* at 652. The Supreme Court acknowledged in *Davis* that "students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Id.* "[S]imple acts of teasing and name-calling among school children, however, even where these comments target differences in gender," are not actionable under Title IX. *Id.* Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect. It is not enough to show that a student has been "teased," or "called ... offensive names." *Davis,* 526 U.S. at 652. Here, Plaintiff's allegations consist of other District students calling him offensive names

regarding his professed sexual orientation. *See* Dkt. No. 18 at ¶¶ 13-31[3]. While the alleged statements are offensive, they are insufficient to state a claim under Title IX, and Plaintiff's Title IX discrimination claim should be dismissed accordingly. *See Davis,* 526 U.S. at 652.

iv. Plaintiff has failed to establish the requisite deprivation of access to an educational opportunity or benefit.

12. In order to state a claim under Title IX, Plaintiff must allege facts which show that the alleged harassment was so severe and pervasive that it "effectively bars the victim's access to an educational opportunity or benefit." *Davis,* 526 U.S. at 633. A mere decline in grades is insufficient to survive a motion to dismiss. *Id.* at 652. Here, Plaintiff makes no factual allegations to support an inference that he was deprived of an educational opportunity or benefit. *See* Dkt. No. 18. Plaintiff's bare and conclusory recitation of this legal element—that Plaintiff "was repeatedly and systematically denied equal access to educational resources and opportunities" is not supported by any well-pleaded facts showing that the Plaintiff suffered the deprivation of any educational opportunity or benefit. Dkt. No. 18 at ¶ 33. While Plaintiff alleges that he was briefly suspended, he makes no allegation that the suspension was due to his gender or sexual orientation, admitting instead that "Isaiah was suspended for merely carrying a ripped Bible at school," the suspension was extended because he admittedly refused a directive given by an assistant principal, and Plaintiff moreover admits that his suspension was later expunged. *See* Dkt. No. 18 at ¶¶ 23-24. While Plaintiff also alleges that he was "ultimately hospitalized" due to depression he experienced while a student at Birdville High School, he makes no allegation that the depression was caused by the alleged discrimination, nor that the

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[3] While Plaintiff alleges that two different students "assaulted" him in an unspecified manner, he makes no allegations that these alleged "assaults" were in any way related to his gender or sexual orientation. *See* Dkt. No. 18 at ¶¶ 20, 25, 26, 29.

hospitalization occurred at a time or in a manner that resulted in the deprivation of an education opportunity or benefit. *See* Dkt. No. 18 at ¶ 42.

v. Plaintiff has failed to state a claim for retaliation under Title IX.

13. To establish Title IX retaliation, Plaintiff must show that the District or its representatives took an adverse action against him because he complained of discrimination. *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 170 (5th Cir. 2011)(citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005)). In his Amended Complaint, Plaintiff alleges that he suffered illegal retaliation under Title IX "as he filed numerous complaints with the School District about the bullying and harassment he experienced and was ultimately punished for advocating on his own behalf." Dkt. No. 18 at ¶ 48. The first allegation of "punishment" included in Plaintiff's Amended Complaint was on October 28, 2013 when he was taken to the assistant principal's office, and Plaintiff admits that he was taken to the assistant principal's office that day because he was tearing pages out of his Bible in the middle of Spanish class. Dkt. No. 18. at ¶ 21. Specifically, the assistant principal "citing *Tinker v. Des Moines Community School District, 89 S.Ct. 733,* told Isaiah that tearing the Bible created a disruption." Dkt. No. 18 at ¶ 21. Plaintiff's only other allegation of "punishment" was on October 30, 2013, when the assistant principal called Plaintiff into his office and began to reprimand Plaintiff for carrying around his torn Bible, asking Plaintiff, "How would Muslims feel if a student was tearing up the Quran?" Dkt. No. 18 at ¶ 22. Plaintiff asserts that he was suspended for one day for carrying the torn Bible. Dkt. No. 18 at ¶ 22-23 ("Serviente clarified that Isaiah was suspended for merely carrying a ripped Bible at school"). Then, the assistant principal demanded that Plaintiff give him the Bible. Dkt. No. 18 at ¶ 23. Plaintiff refused the assistant principal's directive, and the assistant principal extended the one day

suspension to three days. Dkt. No. 18 at ¶ 23. Even taking all of Plaintiff's well-pleaded facts as true, he was punished for tearing a Bible in Spanish class and creating a disruption, subsequently carrying the ripped Bible around campus, and refusing to follow an assistant principal's directive. Dkt. No. 18 at ¶¶ 21-23. Moreover, Plaintiff admits that his suspension was later expunged. Dkt. No. 18 at ¶ 24. Plaintiff has failed to plead facts establishing that he suffered an adverse action because he complained of discrimination, and his Title IX retaliation claim should be dismissed accordingly.

B. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR VIOLATION OF "OTHER LAWS OF THE UNITED STATES" ASSERTED PURSUANT TO 42 U.S.C. § 1983.

14. To the extent that Plaintiff purports to assert a claim against the District pursuant to 42 U.S.C. § 1983, he has failed to state a claim as a matter of law. Plaintiff asserts that the District "acting under color of law and acting pursuant to customs and policies of the district, deprived Plaintiff of rights and privileges secured to him by…. other laws of the United States by discriminating against him on the basis of gender, gender stereotypes and sexual orientation." Dkt. No. 18 at ¶ 46. Plaintiff does not identify which, if any, "other laws of the United States" to which he may be referring, nor does he support this conclusory allegation with any well-pleaded facts to establish a constitutional or other statutory deprivation. *See id.* Plaintiff has thus failed to state a claim under Section 1983.

V. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully moves this Court to grant its 12(b)(6) Motion to Dismiss Plaintiff's First Amended Complaint and grant it any and all further relief to which it shows itself justly entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 10th day of February, 2016, a true and correct copy of the foregoing Defendant's Brief in Support of its 12(b)(6) Motion to Dismiss Plaintiff's First Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted was filed with the Clerk of the Court pursuant to the Standing Order Concerning Paper Filings in Cases Assigned to District Judge John McBryde and has been served on all counsel of record, pursuant to the Federal Rules of Civil Procedure as follows:

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